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Life, Liberty, and the Right to Navigate: Justice Mosk and the Public Trust

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By Jan Stevens**

Introduction

It is no surprise historically or realistically that the major waters of a state should be impressed with a public interest so great as to preclude public or private efforts to restrict their use. Legal systems throughout the world have recognized that navigable waters—if not incapable of private ownership—are subject to the paramount rights of the public.[1] This principle has its roots in the law of the Romans.[2] As one author has stated:

> [T]here developed in the law of the Roman Empire a legal theory known as the "doctrine of the public trust." It was founded upon the very sensible idea that certain common properties, such as rivers, the seashore and the air were held by the government in trusteeship for the free and unimpeded use of the general public.[3]

Consistent with this ancient concept, modern courts have disfavored attempts to convey without restriction the beds and banks of navigable waters to private parties.[4] Recently, however, the pressures of population and development have led to increased efforts to "privatize" the public waters and wetlands.[5] The California Supreme Court has had occasion to deal with such efforts in several recent cases. In a series of

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* "There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits." Flanagan v. City of Philadelphia, 42 Pa. 219, 228 (1862).

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1. *See, e.g.*, H. ALTHAUS, PUBLIC TRUST RIGHTS (1978). In one of the first significant public trust opinions in the United States, the commonality of navigable waters was characterized as stemming from the law of nature, the civil law, and the common law of England. Arnold v. Mundy, 6 N.J.L. 1, 11-12 (1821).

2. *See* J. SAX, DEFENDING THE ENVIRONMENT, 163-64 (1971).

3. *Id.*

4. *See, e.g.*, Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984); Mathews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984).

5. N. DENNIS & M. MARCUS, STATUS AND TRENDS OF CALIFORNIA WETLANDS, REPORT TO CALIFORNIA ASSEMBLY RESOURCES SUBCOMMITTEE ON STATUS AND TRENDS (1984).

four opinions written by Justice Stanley Mosk, the court has added new vitality to the ancient public trust doctrine and ensured the continued preservation of public rights in public waters.

The significance of these opinions is perhaps best expressed numerically: California has approximately 1,500 miles of tidal shoreline and 4,200 miles of shoreline on navigable lakes and rivers.[6] While the demands placed upon these resources have increased dramatically in recent years, the total acreage available for public and private use has remained the same, or in some areas, has been substantially reduced by filling.[7] The reclamation of California's wetlands, begun in the late 1800's, has been carried out with such efficiency that little is left of the state's riparian forests and marshes. The state's wetlands have been reduced to just 450,000 acres in 1984 from an area once ten times as large.[8]

The law has long recognized the need to preserve navigational waters as public highways essential for common use.[9] Only recently, however, has our increased knowledge led to a recognition that wetlands, tidelands, and the shallow shorelines are essential to water purity and maintenance of ecological balance. Once considered wastelands worthy only of immediate filling and reclamation, the wetlands are now recognized as an important wildlife habitat and as a place of recreation and retreat in an increasingly urbanized society. Ironically, however, these resources are being threatened more and more by private commercial encroachment.[10]

Legal responses to the problems of water and wetland ownership and use have varied from state to state. A few states have enacted complex constitutional and statutory schemes.[11] But in most states, like Cali-

6. *California Tideland Trusts*, Report of the Joint Legislative Committee on Tidelands, 9 (1965).

7. The wetlands area surrounding San Francisco Bay, for example, has been reduced from 200,000 acres to only 80,000 acres today. The reduction is caused largely by filling in an attempt to accommodate population increase and port development. N. DENNIS & M. MARCUS, *supra* note 5, at v.

8. Bridges & Fare, *Who's Minding California's Wetlands?*, 8 ENVIRONS 1 (1984); *see also* N. DENNIS & M. MARCUS, *supra* note 5.

9. *See, e.g.*, Silver Springs Paradise Co. v. Ray, 50 F.2d 356 (1931), *cert. denied*, 284 U.S. 649 (1932); Colberg, Inc. v. State *ex rel.* Dept. of Public Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968); Schatz v. Guthrie, 132 N.Y.S.2d 665 (1954).

10. *See* N. DENNIS & M. MARCUS, *supra* note 5.

11. Some statutory schemes have been held by the courts to confer upon the public the right to use water for navigational and recreational purposes. *See, e.g.*, Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). Others have been held to impose public trust duties upon state government. *See, e.g.*, United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976).

fornia, statutory efforts have dealt ad hoc with only specific areas, and the systematic development of the law has been left to the courts.[12] Perhaps the most significant common law development in California dealing with the use and preservation of its waterways and wetlands has been the application of the public trust doctrine.

Justice Mosk's contribution to the development of California's public trust doctrine came in the form of four noteworthy opinions: *City of Berkeley v. Superior Court*,[13] *State v. Superior Court (Lyon)*,[14] *State v. Superior Court (Fogerty)*,[15] and *City of Los Angeles v. Venice Peninsula Properties*.[16] These opinions revived, reaffirmed, and clarified public trust law. Furthermore, they supplied the foundation for the Court's subsequent opinion holding that the exercise of water rights is subject to public trust considerations insofar as they may affect public trust values.[17]

City of Berkeley reaffirmed the long-established California rule that grants of tidal and submerged lands remain subject to the public trust for commerce, navigation, and fisheries in the absence of a clearly expressed

12. In Oregon, for example, the doctrine of custom has been applied by the courts to support public rights in all the sand beaches of that state up to the line of vegetation. *See* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). In Texas and California, the doctrine of implied dedication has been applied to ensure public access to the navigable waters. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Briscoe & Stevens, *Gion After Seven Years: Revolution or Evolution?*, 53 L.A.B.J. 207 (1977). The common law nuisance doctrine has been applied also in California to prevent the maintenance of obstacles in nonnavigable waters, where such obstacles have impaired navigability downstream. *See* People v. Russ, 132 Cal. 102, 64 P. 111 (1901).

In recent years, the California Legislature has shown greater willingness to cope with specific problems by enacting statutes implementing the constitutional policy to maintain free access to navigable waters and preserve them as free highways for the people. *See* CAL. CONST. art X, § 4; PUB. RES. CODE §§ 10000-10003 (West Supp. 1985) (streamflow protection standards); PUB. RES. CODE §§ 29000-29612 (West Supp. 1985) (Suisun Marsh preservation); GOV'T CODE § 66478.5 (public access to navigable waters through subdivisions); PUB. RES. CODE § 66801 (Tahoe Regional Planning Compact). The courts have been ready to give a liberal construction to these statutory provisions in light of the state constitutional mandate to do so. *See, e.g.*, Kern River Public Access Com. v. City of Bakersfield, 170 Cal. App. 3d 1205, 1224-25, 217 Cal. Rptr. 125, 140 (1985); People *ex rel.* Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406, 157 Cal. Rptr. 815, 817 (1979).

13. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

14. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).

15. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).

16. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *rev'd sub nom.* Summa Corp. v. California, 466 U.S. 198 (1984).

17. *National Audubon Soc'y v. Superior Ct. of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983). For an excellent discussion of Audubon and its relation to developing public trust law see Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, Proceedings, Thirtieth Annual Rocky Mtn. Law Inst. (1985).

contrary legislative intent.[18] In *Lyon* and *Fogerty*, the court settled once and for all the controversy over the application of the doctrine to non-tidal navigable waters, such as Clear Lake and Lake Tahoe. In *Venice Peninsula Properties*, the court held that the Mexican tidelands trust, applicable to California ranchos, survived annexation of California by the United States and had not been extinguished by the issuance of federal patents.

This Article examines these significant landmark opinions in the developing body of public trust law. Each of them, while respecting precedent, shows a creative recognition of what Justice Holmes called the "felt necessities of the times."[19] They illustrate the vitality of the common law and its efficacy in environmental preservation.

I. The Public Trust Doctrine

Basic to an understanding of the modern public trust doctrine is the recognition that, historically, certain governmental powers have been characterized as such an inherent part of sovereignty that they are deemed inalienable.[20] As stated long ago by the California Supreme Court, "[t]here are certain inseparable incidents of sovereignty that must exist wherever sovereignty itself is found. Among these is the right to take private property for public purposes, the right of taxation, and the right to control navigable streams. These powers are necessary to the very existence of government."[21] The American common law public trust has its roots in this inalienability concept. That the early public trust doctrine ensured more than the mere control of navigation, however, is illustrated by the case of *Arnold v. Mundy*.[22] In *Arnold*, the New Jersey Supreme Court stated:

> [T]he navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing,

18. 26 Cal. 3d at 528, 606 P.2d at 369, 162 Cal. Rptr. at 335.

19. O.W. HOLMES, THE COMMON LAW, 1 (1881).

20. In Home Savings and Loan v. Blaisdell, 290 U.S. 398 (1934), for example, the Court noted that "the legislature cannot bargain away the public health," in effect prohibiting the legislature from abdicating its responsibility as guardian of public well-being. *Id.* at 436.

21. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 308-09 (1866). Early on, this theory was applied to the beds of navigable waters. As one English commentator said:

> What rule would be applied in case Parliament, in a moment of forgetfulness, should undertake to grant the Thames to a private . . . monopoly, is purely an academic question. But there is no doubt that the courts would defeat an attempt on the part of the grantee to act [on] the grant upon the ground that . . . the grant was void and could not be acted upon.

H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 170 (1904).

22. 6 N.J.L. 1, 11-12 (1821).

> navigation, fishing, fowling, sustenance, and all the other uses of the waters and its products . . . are common to all the citizens . . . .[23]

In *Priewe v. Wisconsin State Land and Improvement Co.*,[24] the Wisconsin Supreme Court considered a statute authorizing drainage of a lake "for the ostensible purpose of promoting the public health"[25] and conveying the exposed lands to an authority empowered to lower the waters. The court held that the act was void because "the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters . . . [even] under the guise of promoting the public health."[26] The court further noted:

> The legislature has no more authority to emancipate itself from the obligation . . . it . . . assumed at the commencement of [Wisconsin's] statehood, to preserve for the benefit of all the people . . . the enjoyment of the navigable waters . . . than it has to donate the school fund or the state capitol to a private purpose. . . . The navigable waters of the state belong to the state . . . .[27]

Similarly, it was stated by the New Jersey Supreme Court in *Arnold* that the state could, through its legislature, authorize innumerable uses of its waters and waterways, but that it could not "make a direct and absolute grant, divesting all the citizens of their common right."[28]

These precedents were recognized by the United States Supreme Court in *Illinois Central Railroad Company v. Illinois*.[29] In that case the Illinois Legislature had purported to convey virtually the entire Chicago waterfront to private parties. When the legislators later had a change of heart and revoked their grant, the Court upheld the revocation on the ground that the state's interest in the waterfront was inalienable.[30] The Court concluded that the title under which a state holds the beds of navigable waters is a title "different in character from that which the State [or the federal government] holds in . . . the public lands which are open to preemption and sale."[31] "It is a title," wrote Justice Field, "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein

23. *Id.* at 76-77.

24. 103 Wis. 537, 79 N.W. 780 (1899).

25. *Id.* at 539, 79 N.W. at 781.

26. *Id.* at 548-49, 79 N.W. at 781.

27. *Id.* at 549-50, 79 N.W. at 781-82.

28. 6 N.J.L. at 13. Such a grant, noted the court, would be contrary to the "principles of [the state's] constitution." *Id.*

29. 146 U.S. 387 (1892).

30. *Id.* at 452-56.

31. *Id.* at 452.

freed from the obstruction or interference of private parties."[32] While the state may grant parcels of such beds for the purpose of improving or furthering navigation and commerce, the abdication of:

> [T]he general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake is not consistent with the exercise of that trust. . . . The [state's control] for [trust purposes] can never be lost, except as to such parcels as are used in promoting the [public interest] or can be disposed of without . . . substantial impairment of the public interest in the lands and waters remaining. The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers. . . .[33]

The California Supreme Court expressly applied the *Illinois Central* doctrine for the first time in *Forestier v. Johnson*.[34] The plaintiff had purchased tidelands embracing "Fly's Bay," a navigable inlet opening into San Francisco Bay, and sought to enjoin others from entering in boats for the purpose of hunting and fishing. The court held that the tidelands patent did not terminate the public uses of navigation and fishery, but merely conveyed to the patentee title to the soil subject to the public right.[35]

The doctrine was again applied by the California Supreme Court in *People v. California Fish Co.*[36] At issue was the effect of a patent under grant statutes providing for the sale of swamp land, salt-marsh, and tidelands. The State argued the patent was invalid because the land in question was sovereign land of the state, held in trust for public use.[37] The

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32. *Id.*

33. *Id. See also* Coxe V. State, 144 N.Y. 396, 406, 39 N.E. 400, 402 (1895), in which it was stated:

> While I am not aware of any . . . restriction [on alienation of lands under tidewaters] to be found in the constitution of this state, . . . it must be deemed to be inherent in the title and power of disposition. The title which the state holds, and the power of disposition, is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit.

34. 164 Cal. 24, 127 P. 156 (1912).

35. *Id.* at 39, 127 P. at 162. The court relied in part on art. XV, § 2 (now art. X, § 4) of the California Constitution, which provides:

> No individual, partnership or corporation claiming or possessing the frontage or title lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, not to destroy or obstruct the free navigation of such water . . . .

See also People v. California Fish, 166 Cal. 576, 588, 138 P. 79, 85 (1913), in which the court stated that "[s]ince the adoption of [the California] Constitution in 1879, . . . grants of such lands by the State carry, at most, only the title to the soil, subject to the public right of navigation."

36. 166 Cal. 576, 138 P. 79 (1913).

37. *Id.* at 584, 138 P. at 82.

court held that any disposition of sovereign lands made by the state subjects the grantee to the same terms upon which they were held by the state. The court further noted that in the administration of the public trust, the state may sell and dispose of lands free of the public easement only "in order to implement a plan or system of improvement or development for the promotion of navigation and commerce."[38]

In terms reminiscent of the United States Supreme Court's characterization of the facts in Illinois Central, the court pointed out that the tidelands embraced in the California grant statutes included "the entire sea beach from the Oregon Line to Mexico and the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes. . . ."[39] However, the California court simply construed the statutes as reserving the public trust interest in the granted lands, thus avoiding the necessity of deciding as the Illinois Central Court had, whether a purported grant of such a magnitude was in itself revocable, if not void.[40] The land thus remained subject to the public rights of navigation and fishery.[41]

The court went on to state:

> If . . . it is found necessary or advisable [to isolate some tidelands] so that they become unavailable for navigation, the state has power to exclude such portions from the public use and to that extent revoke the original dedication. [The land excluded from] navigation may become proprietary land, not subject to the public use, and it may then be alienated irrevocably by the state for private use. . . .[42]

The court added, however, that a determination by the state to cut off portions of tidelands from navigation and to authorize an abandonment of the public use would be closely scrutinized to ascertain the true legislative intent.[43] The purported abandonment would fail where the legislative intent was not "clearly expressed or necessarily implied."[44]

38. *Id.* at 584-85, 138 P. at 82.

39. *Id.* at 591, 138 P. at 85.

40. *Id.* at 591, 138 P. at 85. In the words of one commentator, the California tidelands patent conveys at best a "naked fee" subject to the public right of navigation, fishery, recreation, and environmental preservation. Taylor, *Patented Tidelands: A Naked Fee?*, 47 CAL. ST. B.J. 420, 421 (1972). Insofar as patents under the tideland laws embrace submerged lands, "they convey no title whatever." *California Fish*, 166 Cal. at 601, 138 P. at 89.

41. *California Fish*, 166 Cal. at 584, 138 P. at 82.

42. *Id.* at 597, 138 P. at 88.

43. *Id.* This result is consistent with what one commentator has described as a reluctance on the part of the courts to permit the disposition of public resources under circumstances that may subordinate or reallocate broad public uses to private ones. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 562-63 (1970).

44. *California Fish*, 166 Cal. at 597, 138 P. at 88.

A. The Berkeley Waterfront Case: What Price Fill?

City of Berkeley v. Superior Court[45] was the first of Justice Mosk's public trust opinions. At issue in the case were the majority of the tide and submerged lands constituting the Berkeley Waterfront.[46]

As part of the nineteenth century policy of disposition, the Legislature had created the Board of Tide Land Commissioners, which was authorized to survey and dispose of "certain salt marsh and tidelands belonging to the State of California."[47] Within the ambit of this broad grant of authority were the tide and submerged lands of San Francisco Bay. The state and the City of Berkeley argued that private grants of the Berkeley waterfront lands obtained from the Board were invalid, or at most, conveyed a fee subject to the public trust for commerce and navigation.[48] Initially, the applicability of *Illinois Central* and *California Fish* seemed logically inescapable. However, the Berkeley grants had previously been approved by the California Supreme Court in *Knudson v. Kearney*,[49] in which the court had held that the statutes authorizing the Board to dispose of the tide and submerged lands were enacted as an aid to navigation and to improve San Francisco Bay.[50] Moreover, the court in *Knudson* held that some of the tracts granted by the Board had already been filled and were no longer of direct value to the people under the public trust.[51]

Relying on *Knudson*, the trial court found that the tide and submerged lands were conveyed free of the public trust, and that the state was estopped to deny that the plaintiffs' property was free of the trust, because the state had asserted the contrary position in a previous case.[52]

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45. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

46. *Id.* at 519-520, 606 P.2d at 364, 162 Cal. Rptr. at 329.

47. 1869-70 Cal. Stat. 541; 1867-68 Cal. Stat. 716. The San Francisco Bay became the subject of vast subdivision under these acts, particularly during the late 1800's. By 1970, over 15,000 acres of bay bottom had been claimed by private parties under deeds issued by the Board of Tide Land Commissioners. *See* Amicus Brief of San Francisco Bay Conservation and Development Commission (BCDC) at 3. This acreage constituted 22% of the bottom of the bay. *See* BCDC San Francisco Bay Plan 2 (1969). The surface area of the bay was reduced from 680 square miles in the 1800's to 430 square miles in 1970 because of filling. *Id.*

48. *City of Berkeley*, 26 Cal. 3d at 519-20, 606 P.2d at 364, 162 Cal. Rptr. at 329. The acreage conveyed—over 22,000 acres—far exceeded the 1000 acres at issue in *Illinois Central*. *Id.* at 526, 606 P.2d at 368, 162 Cal. Rptr. at 333.

49. 171 Cal. 250, 152 P. 541 (1915).

50. *Id.* at 252, 152 P. at 542.

51. *Id.* at 251-52, 152 P. at 541-42.

52. *See* Alameda Conservation Ass'n. v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1968), *cert. denied*, 394 U.S. 906 (1969) (sustaining state's argument that conveyance of tidelands to private developers terminated the public trust).

Thus, on appeal, the California Supreme Court was confronted with competing precedents: on the one hand were *Illinois Central* and *California Fish*; on the other was the express holding in *Knudson* that the tidelands were conveyed free of any public trust.

Writing for the majority, Justice Mosk first disposed of the estoppel argument, noting that the doctrine of collateral estoppel does not apply to bar litigation of issues of "great public importance."[53] He then expressly overruled *Knudson*, and held that the Berkeley tidelands remained subject to the public trust despite the absolute form of the grants.[54]

In Justice Mosk's view, the conveyances under the 1870 statute did not meet the requirements of *Illinois Central* and *California Fish*. Thus, *Knudson* was wrongly decided.[55] The Act allowed the Board to grant "the entire waterfront of every community along a substantial portion of the bay to private persons in fee, without reference to whether or not a harbor would be desirable or possible at any particular point."[56] The statute made no reference to any specific public improvement to promote navigation. Its evident purpose was not to improve navigation or commerce but, instead, to raise revenue for the state.[57]

As further support for his decision, Mosk noted that the California Attorney General—at the time of the passage of the original Act—had advised that the purchasers of tidelands would take subject to an easement for commerce and navigation.[58] Mosk cited a provision of the California Constitution prohibiting both the sale of tidelands within two miles of an incorporated city and the obstruction of free navigation of navigable waters.[59] He also emphasized the "checkered history" of California's trusteeship.[60] He noted that the series of acts and constitutional amendments passed during the 1860's and 1870's were in reaction to such prior governmental abuses as fraudulent transfers of tidelands to

53. 26 Cal. 3d at 520 n.5, 606 P.2d at 364 n.5, 162 Cal. Rptr. at 329 n.5.

54. *Id.* at 521, 606 P.2d at 369, 162 Cal. Rptr. at 334.

55. *Id.* at 531-32, 606 P.2d at 371-72, 162 Cal. Rptr. at 336-37.

56. *Id.* at 529, 606 P.2d at 370, 162 Cal. Rptr. at 335.

57. *Id.* at 530, 606 P.2d at 370, 162 Cal. Rptr. at 335.

58. *Id.* at 529, 606 P.2d at 370, 162 Cal. Rptr. at 335.

59. CAL. CONST. art. X, §§ 3-4. During the debates concerning the adoption of this provision at the Constitutional Convention of 1879, it was observed that in the preceding 25 years, California's liberal land grant policy had nearly resulted in "the monopolizing of every frontage upon navigable waters in [the] state . . . by private individuals." Debates and Proceedings, Cal. Const. Convention 1878-79 (cited in *City of Berkeley*, 26 Cal. 3d at 523, 606 P.2d at 366, 162 Cal. Rptr. at 331).

60. 26 Cal. 3d at 522-23, 606 P.2d at 365-66, 162 Cal. Rptr. at 335.

private interests.[61]

For Mosk, the "crucial question" in the case involved the retroactivity of the *Berkeley* decision.[62] Adopting an equitable rationale, he declined to hold either that all grants made under the 1870 Act should be subject to the public trust or that the *Berkeley* decision should apply only prospectively.[63] The former alternative would have reduced the value of investments that might have been made in reliance on the *Knudson* decision "without necessarily promoting the purposes of the trust."[64] But because the grants at issue were over a century old, the latter alternative would have rendered the *Berkeley* decision a mere "academic exercise."[65]

Mosk harmonized the competing interests of the public and the grantholders by ruling that the public trust remained only in property "still physically adaptable for trust uses."[66] Tidelands that had been rendered "substantially valueless for [trust] purposes by being filled . . . [would be] free of the trust to that extent."[67]

Mosk's reasoning in *Berkeley* evidenced a pragmatic recognition of the purpose of the public trust doctrine, yet gave appropriate consideration to the reasonable expectations of those holding title to trust properties. He applied established public trust principles to protect the rights of the public in a difficult factual and legal setting, and at the same time protected the justifiable expectations of private landowners.

B. *State of California v. Superior Court (Lyon)*: The Public Trust and Nontidal Waters

In *State of California v. Superior Court (Lyon)*,[68] the California Supreme Court considered the applicability of the public trust doctrine to nontidal marshland waters adjoining Clear Lake, a navigable inland lake with an area of about sixty-four square miles. The plaintiff, Lyon, had purchased a 500 acre tract of marshland—one of the few remaining wetland areas on the lake.[69] A former owner had constructed a levee in

61. *Id.*
62. *Id.* at 533, 606 P.2d at 373, 162 Cal. Rptr. at 338.
63. *Id.* at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* Mosk noted that "a number of cases hold or state that the reclamation of tidelands subject to the public trust does not, without more, terminate the trust, but [those] cases did not involve the interest of landowners who had reclaimed tidelands in reliance upon decisions that were subsequently overruled." *Id.* at 535 n.19, 606 P.2d at 374 n.19, 162 Cal. Rptr. at 339 n.19 [citations omitted].
68. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).
69. *Id.* at 216, 625 P.2d at 241, 172 Cal. Rptr. at 698.

an effort to reclaim the marshlands. The levee had been mysteriously breached, however, and never repaired. When Lyon sought a permit to repair the levee, his request was denied on the ground that the state claimed ownership of the portion of the marsh extending below the lake's high water mark.[70] Lyon sued to quiet title, relying on a California statute which provided that a purchaser of land bordering on a navigable, nontidal lake or stream "takes to the edge of the lake or stream at the low water mark."[71]

The United States Supreme Court had made clear in *Shively v. Bowlby* [72] that the ownership of riparian lands between high and low water was to be determined under state law.[73] Superficially, California Civil Code section 830 appeared to embody a low water rule. Lyon further argued that California, by its adoption of the common law in 1850,[74] had embraced the English rule limiting title for purposes of navigation to tidal waters.[75]

The state argued, however, that section 830 conflicted with both the doctrine of *Illinois Central*, which prohibits the wholesale alienation of public trust lands, and the statutory construction rule of *California Fish*, which requires a grant of sovereign lands to be construed—if at all possible—to retain the public trust.[76] The state also pointed out that some 4,200 miles of shoreline along thirty-four navigable lakes and thirty-one navigable rivers could be affected by the outcome in the case, and that the marshlands at issue themselves constituted one-half of the remaining marshland on Clear Lake.[77]

Writing for the majority, Justice Mosk first noted that the purported English distinction[78] between tidal and nontidal waters had not been ap-

70. *Id.* at 215, 625 P.2d at 241, 172 Cal. Rptr. at 698.

71. CAL. CIV. CODE § 830 (West 1983).

72. 152 U.S. 1 (1894).

73. *Id.* at 216. *See also* Barney v. Keokuk, 94 U.S. 324, 338 (1876). Twenty states have adopted a low water boundary; ten have adopted a high water boundary. Of the remaining states, a few allow private ownership to the middle of the water, while others have adopted altogether different rules. *See Lyon*, 29 Cal. 3d at 216 n.4, 625 P.2d at 242 n.4, 172 Cal. Rptr. at 699 n.4.

74. *See* 1850 Cal. Stat. 95.

75. 29 Cal. 3d at 216-17, 625 P.2d at 242-43, 172 Cal. Rptr. at 699-70. This distinction did not actually exist in English law, but misinterpretation by some state courts led to its adoption in several eastern states. *See* Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 53-54 (1976).

76. 29 Cal. 3d at 231-32, 625 P.2d at 251-52, 172 Cal. Rptr. at 708-09.

77. *Id.* at 216, 625 P.2d at 242, 172 Cal. Rptr. at 699.

78. *See* Deveney, *supra* note 75.

plied by most American courts.[79] Indeed, the *Illinois Central* opinion itself illustrated the rejection of the English rule.[80] He then observed that Civil Code section 830 for many years had been construed to create a low water boundary on nontidal waters.[81] Moreover, two states with similar statutes had interpreted them as conveying title to the low water mark.[82] Thus, a good argument could be made that Section 830 limited the state's fee title to the low water mark.

Mosk nonetheless held that the lands between the low and high water marks remained subject to the public trust.[83] Any other conclusion would have required the disapproval of *California Fish* and its progeny.[84] Moreover, if a statute authorizing the *conveyance* of sovereign lands could "not be interpreted to abandon the public trust unless no other interpretation [was] reasonably possible,"[85] Civil Code section 830—which contained no words of conveyance—could hardly operate to terminate the trust interest in the Clear Lake waters.[86]

Mosk also noted that the *Lyon* holding would effect "less of an interference with property rights than occurred in *Illinois Central, California Fish* and *City of Berkeley*. In those cases the landowners had received outright grants from the state, purportedly in fee, while . . . [Lyon's] title . . . is based only upon administrative interpretation of an ambiguous statute."[87] Finally, Mosk emphasized that Lyon could continue to make use of the lands between the low and high water marks "in any manner not incompatible with the public's interest in the property."[88]

In the companion case of *State v. Superior Court (Fogerty)*, [89] the court addressed two additional issues—this time with respect to the shoreline of Lake Tahoe. Plaintiffs argued that the state was estopped from claiming an interest in lands above the low water mark because of its long-standing recognition of the landowners' fee interest to that level. Mosk wrote that the doctrine of estoppel should not apply if "the result

79. 29 Cal. 3d at 219, 625 P.2d at 244, 172 Cal. Rptr. at 701. *See also* McManus v. Carmichael, 3 Iowa 1, 27 (1856); Cates v. Wadlington, 12 S.C.L. (1 McCord) 580, 582 (1822); Carson v. Blazer, 2 Binn. 475, 484-86 (Pa. 1810).

80. The *Illinois Central* Court applied the public trust doctrine to Lake Michigan—a nontidal body of water. *See Illinois Central*, 146 U.S. 387 (1892).

81. 29 Cal. 3d at 221, 625 P.2d at 245, 172 Cal. Rptr. at 702.

82. *Id. See also* Herrin v. Southerland, 74 Mont. 587, 595, 241 P. 328, 331 (1925).

83. 29 Cal. 3d at 229, 625 P.2d at 250, 172 Cal. Rptr. at 708.

84. *Id.* at 231, 625 P.2d at 251, 172 Cal. Rptr. at 708.

85. *Id.*

86. *Id.* at 222, 625 P.2d at 246, 172 Cal. Rptr. at 703.

87. *Id.* at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.

88. *Id.*

89. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 696 (1981).

would be to nullify a strong rule of policy adopted for the benefit of the public."[90] He reiterated the importance of the public values at stake:

> The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish, . . . birds, . . . and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.[91]

In Mosk's view, public policy commanded rejection of estoppel and application of the public trust: "The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands."[92]

Mosk then turned to the complex issue of determining the proper boundary between public and private use: should the line be drawn at the "natural" level of the lake before it was dammed in 1870? Here Justice Mosk showed the same pragmatism that characterized his opinion in *City of Berkeley*.[93] The difficulty of reconstructing the natural water level of the lake—or that of hundreds of lakes and streams dammed in California since the early days of statehood—provided "a convincing justification for accepting the current level of the lake as the appropriate standard."[94] He noted that the Lake Tahoe dam had been in existence "long past the period required for the acquisition of prescriptive rights."[95] The public arguably had acquired, therefore, a prescriptive right for public trust purposes in the lands lying between the natural and artificial low water points.[96] Finally, Justice Mosk cited—by way of analogy—cases holding that a landowner may enforce the maintenance of a long-continued artificial condition when there have been substantial expenditures made in reliance upon the condition.[97]

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90. *Id.* at 244, 625 P.2d at 259, 172 Cal. Rptr. at 716.

91. *Id.*

92. *Id.* at 247, 625 P.2d at 260, 172 Cal. Rptr. at 717.

93. *See supra* notes 62-67 and accompanying text.

94. 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.

95. *Id. See also* State *ex rel.* O'Connor v. Sorenson, 222 Iowa 1248, 1256, 271 N.W. 234, 238-39 (1937); State *ex rel.* Thompson v. Parker, 132 Ark. 316, 322, 200 S.W. 1014, 1016 (1918).

96. 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.

97. *Id.* at 249 n.5, 625 P.2d at 261 n.5, 172 Cal. Rptr. at 718 n.5. *See also* Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 197, 143 P.2d 12, 15 (1943); Chowchilla Farms, Inc. v. Martin, 219 Cal. 1, 18, 25 P.2d 435, 441 (1933).

Both the *Lyon* and *Fogerty* opinions exemplify the extension of public trust protection beyond its primary nineteenth century rationale—protection of the public uses of navigation, commerce, and fishery[98]—to other public uses. As the New Jersey Supreme Court has stated:

> [T]he public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.[99]

That Justice Mosk shares this philosophy of the public trust doctrine is illustrated by his thoughtful opinions. In *Lyon*, he indicated that the scope of the public's right in both tidal and nontidal waters extends to "recreational uses and the right to preserve the tidelands in their natural state."[100] The California Supreme Court had previously recognized the broadened scope of the public trust doctrine with respect to *tidal* waters.[101] In an opinion in which Mosk joined, the court had stated:

> In administering the [public] trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[102]

98. *See* Shively v. Bowlby, 152 U.S. 1, 11 (1894); *California Fish*, 166 Cal. at 584-85, 138 P. at 82-83. For a discussion of the development and rationale of the public trust doctrine see National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 433-40, 658 P.2d 709, 718-23, 189 Cal. Rptr. 346, 346-55, *cert. denied*, 464 U.S. 977 (1983). In the nineteenth century, it was important that waters susceptible of public commerce be considered public waters because of their significance to the economic health of the growing nation. As Chief Justice Taney pointed out in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842):

> [T]he men who first formed the English settlements could not have been expected to encounter the many hardships [of] the new world, and to people the banks of its bays and rivers if the land under the water at their very doors [had been] liable to immediate appropriation . . . as private property; and the settler upon the . . . land thereby excluded from its enjoyment . . . without becoming a trespasser upon the rights of another.

Id. at 414.

99. Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972).

100. 29 Cal. 3d at 230, 625 P.2d at 251, 172 Cal. Rptr. at 707.

101. *Id.* at 230, 625 P.2d at 251, 172 Cal. Rptr. at 708.

102. Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

Justice Mosk emphasized in *Lyon* that the common law distinction between tidal and nontidal waters had been "thoroughly discredited" and concluded that the scope of the public's rights in nontidal waters should be as broad as it is in tidal waters.[103] Finally, he made clear "that the public's interest is not confined to the water, but extends also to the bed of the water."[104] Thus, *Lyon*, through the public trust, protects the "shorezone" between low and high water marks on California's navigable nontidal waters.[105]

C. *City of Los Angeles v. Venice Peninsula Properties*: California Finds Its Roots Until the U.S. Supreme Court Intervenes

The fourth Mosk opinion discussed here dealt with perhaps the most difficult issue: the applicability of the public trust doctrine to tidelands and uplands acquired in rancho grants from the Mexican government prior to California's statehood. In *City of Los Angeles v. Venice Peninsula Properties*,[106] the city argued that a public trust applied to Ballona Lagoon—an arm of the Pacific Ocean in the Marina Del Rey region of Los Angeles. The city brought a quiet title action in the lagoon to clear the legal obstacles to city plans to dredge it, construct sea walls, and make other improvements. The city alleged that by virtue of the public trust, the public owned an easement in the lagoon for commerce, fishing, navigation, and other public purposes.[107]

The lagoon tidelands had never been held in fee by either the State of California or the federal government.[108] The Mexican government had conveyed the tidelands to private owners prior to cession of California to the United States. The federal government later patented the grants pursuant to the Treaty of Guadalupe Hildalgo.[109] *Venice* thus differed from *City of Berkeley*, *Lyon*, and *Fogerty*, in which the property "was originally owned in fee by the state or federal govenment and [later] granted . . . to private persons."[110]

The city established through expert testimony that the lagoon was subject to a civil law public trust under Mexican law when it became a

103. 29 Cal. 3d at 230-31, 625 P.2d at 251, 172 Cal. Rptr. at 108.

104. *Id.*

105. The doctrine apparently would not apply, however, to bodies of water that did not exist at the time of California's admission to statehood, nor to waters that exist entirely on the property of a private landowner.

106. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *rev'd sub nom.* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984).

107. *Id.* at 292, 644 P.2d at 794, 182 Cal. Rptr. at 601.

108. *Id.* at 291, 644 P.2d at 792, 182 Cal. Rptr. at 601.

109. *Id.*

110. *Id.*

rancho in 1839.[111] The fee owners argued, however, that when the federal government patented title under the treaty of Guadalupe Hidalgo, a trust interest was not reserved. The public trust had been, in effect, "laundered out."[112]

Speaking through Justice Mosk, the California court held that the United States acquired the interest of the Mexican government in these lands when it acquired California.[113] When California became a state, the public trust interest in the rancho tidelands passed to the state as an incident of sovereignty.[114] Any other result, Mosk pointed out, would have created a "California Mason-Dixon coastline":[115] the south—largely former Mexican ranchos—would be free of the trust, while the north coast would remain subject to the common law public trust doctrine.[116]

Unfortunately, this result was only briefly forestalled. The United States Supreme Court reversed *Venice Peninsula Properties* on the ground that the federal patent process had extinguished all prior rights, including the Mexican trust.[117]

II. The Changing Concepts of Navigability and Title

Justice Mosk's public trust opinions have provided a foundation for further developments of public trust law. In the recent case of *National Audubon Society v. Superior Court (Los Angeles Department of Water & Power)*,[118] the California Supreme Court harmonized the apparent conflict between the trust doctrine and appropriative water rights. Los Angeles had diverted nonnavigable tributaries feeding Mono Lake, California's second largest lake. As a result, the lake had dramatically decreased in size.[119] The court held that appropriative water rights are

111. *Id.* at 297, 644 P.2d at 797, 182 Cal. Rptr. at 604. Since the drafting of Las Siete Partidas in 1265, the law of Spain, and later Mexico, had reflected the law of Justinian, which provided that the sea and its shores—extending to the mark reached by the highest winter waves—were incapable of private ownership. *See* R. SANDARS, THE INSTITUTES OF JUSTINIAN, 2.1.3 (4th Ed. 1867).

112. 31 Cal. 3d at 299, 644 P.2d at 798, 182 Cal. Rptr. at 608.

113. Id. at 298, 644 P.2d at 792, 182 Cal. Rptr. at 599.

114. Id. at 302, 644 P.2d at 801, 182 Cal. Rptr. at 608.

115. 31 Cal. 3d at 302-303, 644 P.2d at 801, 182 Cal. Rptr. at 608.

116. *Id.*

117. Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984). Congress had provided for review of Mexican land claims by the Board of Land Commissioners. Act of March 3, 1851, §e, ch. 41, 9 Stat. 631, 632. The Supreme Court held in *Summa* that any interests of the State of California in rancho lands patented by the Board were extinguished by the state's failure to assert them in the Board's proceedings. *Id.* at 200.

118. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

119. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

impliedly conditioned by the public trust, and the state as trustee has continuing supervisory authority.[120] It also held that the public trust doctrine protects navigable waters from any harm that would result from the diversion of their nonnavigable tributaries.[121]

This result hints at one remaining puzzle not yet resolved: the changing concept of navigability. Whether waters must be "navigable" under the federal test for *title* in order for the public trust to attach is not at all clear. The beds of navigable waters belong to the states as an inherent attribute of their sovereignty.[122] Under the traditional "title" test, "navigable" waters are only those waters that in their natural condition could have been used for trade or commerce at the time of the state's admission to the union.[123] In determining their boundaries, federal law applies because the states acquire their sovereign lands, to which the trust doctrine applies, through the Federal Constitution.[124]

As *National Audubon* illustrates, however, state concepts of navigability have become increasingly important. *National Audubon* extended public trust protection to nonnavigable tributaries of a navigable lake.[125] In so doing, the opinion cited a number of cases in which a contemporary definition of navigability was applied for purposes of defining public rights of passage.[126] Other states have also relied on similar definitions to vindicate public trust rights. In *Day v. Armstrong*,[127] for example, the court held that if a stream could be navigated by small recreational craft, the stream was navigable.[128] In *Nekoosa-Edwards Paper Co. v. Railroad Commission*,[129] the Wisconsin Supreme Court stated:

> Many of the meandering lakes and streams of this state . . . have ceased to be navigable for pecuniary gain. They are still navigable in law; that is, subject to the use of the public for all the incidents of navigable waters. As population increases, these waters are used by the people for sailing, rowing, canoeing, bathing, fishing, hunt-

120. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

121. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

122. United States v. Oregon, 295 U.S. 1, 14 (1935).

123. *See, e.g.*, United States v. Utah, 238 U.S. 64, 76 (1931); Bohn v. Albertson, 107 Cal. App. 738, 742, 238 P.2d 128, 131-32 (1951).

124. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 376 (1977); Shively v. Bowlby, 152 U.S. 1, 57 (1894).

125. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

126. *Id.* at 435-37, 658 P.2d at 720-21, 189 Cal. Rptr. at 356. The court cited inter alia, People v. Russ, 132 Cal. 102, 64 P. 111 (1901); Gold Run D. & M. Co., 66 Cal. 138, 4 P. 1152 (1888).

127. 362 P.2d 137 (Wyo. 1961). *Accord,* Luscher v. Reynolds, 153 Or. 625, 634-35, 56 P.2d 1158, 1162 (1936).

128. 362 P.2d at 195-96.

129. 201 Wisc. 40, 228 N.W. 144 (1929).

ing, skating and other public purposes.[130]

However, the courts have placed limits on the expansion of public trust protection. In *San Diego County Archaeological Society, Inc. v. Compadres*,[131] the California Court of Appeal rejected an attempt to impose a trust upon twenty acres of dry land purportedly containing a "significant and rare archaeological site."[132] Although the *Lyon*, *Fogerty*, and *Venice* opinions evince a willingness to interpret liberally the public trust doctrine consistent with its purposes, *Compadres* demonstrates an unwillingness on the part of at least one California court to apply it to dry land.

Another question for the courts to resolve is whether the trust can be applied to property in which the government has never held title. In *Venice Peninsula Properties*, Justice Mosk expresssly disapproved dictum in the *Compadres* opinion "that the public trust doctrine applies only to property to which the state has at one time held title."[133] Mosk's statement remains highly significant, despite the reversal of Venice Peninsula Properties by the United States Supreme Court.

The subsequent imposition of the trust on nonnavigable tributary waters in *National Audubon* demonstrates that the public trust doctrine is still very much alive in California. The opinion also hints that previous state ownership is no prerequisite to application of the trust: "the power of the state as administrator of the public trust . . . extends . . . to the enforcement of the trust against lands long thought free of the trust."[134]

Recently, the Supreme Court of Montana ruled in accordance with the *Fogerty* and *Lyon* decisions and upheld the right of the public to use the waters and bed of the Dearborn River up to its high water mark.[135] The court applied the public trust doctrine without regard for title to the bed.[136] In the court's view, the essential question was "whether the waters owned by the state under the constitution [are] susceptible to recreational use by the public."[137] The court stated:

130. *Id.* at 47, 228 N.W. at 147. The Minnesota Supreme Court put it another way: "[N]avigable waters in contrast with nonnavigable waters is but one way of expressing the idea of public waters, in contrast with private waters." State v. Korrer, 127 Minn. 60, 62, 148 N.W. 617, 618 (1914).

131. 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (1978).

132. *Id.* at 925, 146 Cal. Rptr. at 787.

133. 31 Cal. 3d at 299 n.11, 644 P.2d at 798 n.11, 182 Cal. Rptr. at 605 n.11.

134. 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

135. Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984).

136. *Id.* at 171.

137. *Id.* at 170.

> The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the state and held in trust for the people by the state, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[138]

This opinion evidences the steady erosion of the mechanistic view of the public trust—as an easement retained in granted bottom lands—in favor of a more rational "public use" test, which focuses on the public benefits accruing from the application of the trust. One criterion often used to evaluate the "public use" benefit is whether the body of water is navigable by small recreational craft. In *People ex rel. Baker v. Mack*,[139] the court characterized the test as whether the waters "are capable of being navigated by oar or motor-propelled small craft."[140] Several other courts have suggested that the public trust attaches to streams without attempting to examine their navigability in the title sense, relying on their useability for pleasure boating.[141] A few courts—including the California Supreme Court—have applied the doctrine to protect public trust values even though its application cannot be justified by reference to either navigability (in the traditional nineteenth century sense) or title.[142]

One of the principal problems in removing the public trust from its roots in fee ownership of the beds of navigable waters is the possibility

138. *Id.*

139. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).

140. *Id.* at 1040, 97 Cal. Rptr. at 454. *See also* Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C.D. L. REV. 579 (1983).

141. *See, e.g.*, Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914) (holding that a hunter had a right to navigate his boat into a grove of vegetation navigable during annual periods of flooding).

142. For example, a New Jersey court has reasoned that the public trust authorizes a public right of access to and use of dry sand areas beyond the tidal zone of municipal and quasi-municipal property. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984). In Wisconsin the doctrine has been cited to justify the imposition of development restrictions on land within 1,000 feet of a navigable lake or within 300 feet of a navigable river. Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972). The *Just* court emphasized that Wisconsin's "active public trust duty . . . requires the state not only to promote navigation but also to protect and preserve [the] waters for fishing, recreation and scenic beauty." *Id.* And as previously discussed, the California Supreme Court, in the *Audubon* case, found protection in the public trust for navigable waters threatened with destruction by the diversion of their nonnavigable tributaries. *Audubon*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983). Finally, the North Dakota Supreme Court has held that the public trust imposes a duty on the state to plan comprehensively for the use of its water resources. United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 460 (N.D. 1976).

that the trust rights will recede along with the waters.[143] Under traditional public trust theory, the trust remains attached to the beds, even when the waters have been drained or filled.[144] There is a certain reassuring logic to hold that the trust survives as a retained vestige of the state's prior fee ownership, like the smile of a jurisprudential cheshire cat.

But predicating public rights to waters on bottom ownership raises other paradoxes. For example, although the Wisconsin courts have long upheld the right of the public to use the state's navigable streams and lakes for fishing, hunting, and boating,[145] Wisconsin property law gives title to the bed of a navigable stream to the riparian owner.[146] However, the state holds title to the bed of a navigable *lake*.[147] These distinctions may lead to seemingly irrational differences in the treatment of public rights to use these waters. For instance, courts have differed as to whether anglers may merely pass through water in a boat or also have the right to walk in wading boots on the submerged bed.[148] Thus, Wisconsin's inconsistent approaches could lead, hypothetically, to the result that one can fly cast or angle in Wisconsin's lakes, but not in Wisconsin's rivers or streams, precisely the opposite of the angler's dream.

Evolving definitions of navigablility have expanded public rights to use waters for recreation. Recreational and environmental uses now protected by the trust clearly go far beyond the commercial navigation that was its nineteenth century rationale. These two juridical streams, still theoretically separate, seem ready to converge.

143. *See* Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893), stating that when waters "have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters[,] and their former beds . . . become the private property of the riparian owners."

144. *See, e.g.,* Atwood v. Hammond, 4 Cal. 2d 31, 42, 48 P.2d 20, 25 (1935). This traditional theory has been qualified by the courts, however, in two respects. First, in Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951), the California Court of Appeal held that the owner of the underlying bed had the right to reclaim his land after the receeding of flooding caused by avulsion. In Wilbour v. Gallagher, 77 Wash. 2d 306, 426 P.2d 232 (1969), *cert. denied,* 400 U.S. 87 (1970), the Washington Supreme Court held that littoral owners had no right to fill their land.

145. *See, e.g.,* Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

146. *Id.*

147. Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935).

148. The Wyoming Supreme Court, for example, has held that where waters are owned by the state but the beds are owned by private landowners, the public is allowed to float boats or other craft, but is forbidden to wade in the water. Day v. Armstrong, 362 P.2d 137, 146 (Wyo. 1961). However, the Michigan Supreme Court dismissed a riparian landowner's trespass suit against a fisherman. The court affirmed the landowner's title to the streambed, but held that the title was subject to a public trust, which conferred on the public the legal right to wade in the stream for fishing. Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926).

Conclusion

A vigorous common law public trust doctrine is much needed in an era of waning conservation efforts at the federal level.[149] Federal trusteeship, so easily abrogated by implied congressional repeal, is a fragile reed on which to base environmental preservation.

Thanks in no small part to Justice Stanley Mosk, the people of the State of California may enjoy their incomparable coastline, lakes, and rivers with reasonable assurance against encroachment. Between high and low water on California's navigable lakes and rivers, the people have the right to fish, to enjoy nature, to beach their craft, and to hike and picnic.

In *City of Berkeley*, *Fogerty*, *Lyon*, and *Venice Peninsula*, Justice Mosk has made notable contributions to environmental law. These opinions exemplify the development of the common law in its highest form: drawing on history and established precedent, they resolve modern needs in both a realistic and fair manner. By reasserting and extending the ancient doctrine of the public trust, Stanley Mosk has singularly contributed to the preservation of our water resources. For this, we, and future generations, owe him a debt of gratitude.

149. *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1981), in which Justice Rehnquist pointed out that federal common law is at best "subject to the paramount authority of Congress"). One federal court recently found certain public trust rights to have been pre-empted by federal statutes. *See* Sierra Club v. Andrus, 487 F. Supp. 443 (D.C. 1980), *aff'd on other grounds sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).